No. 13400

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL No. 504, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE RESPONDENT INTERNATIONAL ASSOCIATION OF MACHINISTS, LOCAL NO. 504

PLATO E. PAPPS
Counsel,
International Association of Machinists, Local No. 504.

INDEX

AUTHORITIES CITED

Cases:

Statutes:

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PRELIMINARY STATEMENT

The Respondent Union does not dispute the description of the Board's findings and conclusions (Board's Brief, p. 2, 10 and 12), and its statement of the subsidiary facts as set forth in its Brief (p.2 to 10).

SUMMARY OF ARGUMENT

The points upon which the Respondent takes issue with the Board's findings and conclusions are as follows:

I. Whether there is substantial evidence to support

the Board's inference that: (1) the Union never intended, during the period of time when the union security contract here involved was in effect, to admit Scheuermann *to membership* in the Union unless he paid the fine; and (2) the Union would have requested *his discharge* in any event, had he made the tender of dues and initiation fees required by the *express* provisions of the contract: [1] and,

II. Even if it be assumed that the Board could validly find that the Union would not have *accepted* such dues and initiations fees, in the absence of a concurrent tender of the fine, as being sufficient to comply with intra-union *membership* rules for acquisition of *membership*, such showing does not warrant the inference that the Union would nevertheless have demanded Scheuermann's discharge. Indeed, such evidence as there is leads to a contrary implication.

ARGUMENT

I. The evidence does not preponderate in favor of a finding that the Union would not have taken Scheuermann into membership even if he had tendered the dues and initiation fees.

The Board's unfair labor practice "case" rests almost wholly upon a subsidiary finding, reflecting an inference drawn from the facts, that the Union made known to Scheuermann that it did not intend to and would not have admitted Scheuermann to *membership*

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[1] The provisions of the contract relating to the conditions under which the union membership shall affect employment are—as set forth in the Board's Brief, footnote 5, page 5—cast in language which is almost identical to that contained in Proviso (B) of Section 8(a)(3) of the Act (Appendix 1). The Board's decision implicitly finds that the contract is valid in all respects.

at the time here material, unless he offered to pay the fine. From this inference the Board further concluded that, as the Union had made known to Scheuermann that it would not admit him to membership, Scheuermann's tender of dues and initiation fees—without a concurrent tender of the fine—would have been a "futile" gesture; and that, accordingly, such "futility" constituted a legal "excuse" for his conceded failure to make the tender he knew to be required by the express provisions of the contract, as a condition of retaining *employment*. The Board's reasoning and argument is unsound because, as it will be shown hereinafter, Scheuermann was not discharged "because of his nonpayment of a fine"; but rather because he had failed to comply with the said provisions of the contract *by not tendering* his initiation fees and dues.

It is submitted that if Scheuermann was required to make a tender, his failure to do so—and it is not denied that he failed to do so during the only period under the contract (October 10th through November 11th) in which he was required to make a tender—would justify the Union in causing his discharge, and would justify a reversal of the Board's opinion.

The error in the foregoing findings of the Board so far as they go to the Union's intent to deny Scheuermann membership unless he paid the fine is the attribution to Scheuermann of *knowledge* that the Union so intended.[2] In attributing such knowledge to Scheuermann, the Board has resorted wholly to surmise and conjecture.

For assuming, *arguendo*, that the Union would not

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[2] We do not concede that the record will establish that the Union did in fact have such intent. But in any event, we maintain that the existence of such intent is immaterial.

have granted him membership in the Union unless he paid his fine, Scheuermann would have had to know of that undisclosed intent on the part of the Union.[3] Furthermore, the Board would have to rely on a further assumption that Scheuermann's failure to offer his dues and initiation fees would have been caused because of this undisclosed intent on the part of the Union. In other words, the majority of the Board is basing assumption upon assumption and does that in relation to an alleged intent which had not even been disclosed by the Union. Because of the importance of this point, I may be excused to reiterate that the majority of the Board assumed: (1) that during the period between October 10th and November 11th, the Union had the intent to prevent Scheuermann from becoming a member because of nonpayment of a fine; (2) on the basis of that assumption, they base another assumption, namely, that Scheuermann *knew* of this assumed intent on the part of the Union which had not yet even been disclosed, until after the said 30 day period; and (3) finally, on the basis of the second assumption, the majority made a third assumption; namely, that Scheuermann refrained from making a tender because of this undisclosed intent on the part of the Union. But nowhere in the 30 day crucial period between October 10, 1949 and November 11, 1949, is there any evidence that would indicate that the Union *required* the payment of the fine as a condition of *con-*

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[3] The body of union rules to which the Board refers in part in its findings does not preclude the possibility that the fine would have been waived, had application been made by Scheuermann at the time immediately preceding his discharge.

tinued employment. Nor is there any evidence that membership was denied him in the Union during this 30 day period because of the nonpayment of the fine for the reason that he never *applied.*. For the reasons stated above, the Board's findings in this regard should be reversed.

II. The evidence does not preponderate in favor of a finding that even if Scheuermann had tendered his dues and initiation fees the Union would have requested his discharge.

In this portion of the argument we assume without conceding, that the evidence will support a finding that the Union would not in fact have admitted Scheuermann to membership without the payment of the fine and that such a fact was known to Scheuermann. We maintain, however, that this finding would not support a conclusion that, what the Union told Scheuermann, in effect, was "it is useless for you to make any effort to meet your obligation *under the contract*, of *tendering* your initiation fees and dues, because whether you do so or not, we are going to seek your *discharge*, and the Employer is required to honor our demand under the contract." Nothing in the record even remotely supports such a conclusion. For it is conceded—and the Board so found—that Scheuermann knew what the contract provided. It is indisputable that all the contract says to any employees aware of its provisions is "what you are required to do in order to retain your employment is to tender your initiation fees and dues, and this is all." It does not say that "if you make such tender and the Union refuses the tender and will not accept you as a member, it will nevertheless seek your discharge." Indeed, the contract provisions clearly say otherwise.

In such circumstances, the Board's grant of an "excuse" to an employee from compliance with dues and initiation fees tender provisions of a valid contract is purely gratuitous. But more, the use of such an "excuse" doctrine as a premise for an 8(b)(2) finding, has the effect of: (1) either forbidding a union from adopting any rules restricting its membership; or (2) requiring a union to make known to every employee covered by a valid union shop contract that his tender of dues and initiation fees guarantees him *membership* —as distinguished from *employment*. But this would be contrary to the clear intent of the Act, that unions shall be free to deny *membership* to anyone for any reason whatsoever, so long as the right *to work* is not affected. This is clearly indicated by the proviso to Section 8(b)(1)(A) of the Act which states: ". . . . *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." For as the Board said in interpreting the proviso in *International Typographical Union et al*, (86 NLRB 951, 957):

> "In our view, by including this *proviso*, Congress unmistakably intended to, and did, remove the application of a union's membership rules to its members from the proscriptions of 8(b)(1)(A)* irrespective of any ulterior reasons motivating the union's application of such rules or the direct effect thereof on particular employees."

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* . . . . It is unnecessary to more than mention that the guarantee of a right to "prescribe" rules extends to the enforcement of such rules as well."

If it is valid to establish intra-union rules which deny membership, then it is valid to publish such rules.

And exercise of such right should not be automatically equated to exercise of a *power* to cause denial of employment. So that what the Board here is doing, is *not* applying the provisions of the Act as written, but rather it is legislating new provisions.

It is nowise established by the record that had Scheuermann made his tender of dues and initiation fees, at the proper time, that the Union would nevertheless have caused the denial of his employment.

It is submitted that whatever facts the Board has resorted to in adopting such a premise, must be weighed in the light of certain presumptions to which the Union is justly entitled; namely, (1) that the Union knew the provisions of the Act; (2) that the Union would not willfully violate the Act; and, (3) that a discharge caused by a union under color of a union security contract after refusal of dues and initiation fees properly tendered constitutes an unfair labor practice.[4] In fact no presumptions need be made as to the first premise because the express provisions of the contract repeat the express provisions of the Act.

What facts did the Board have before it? Simply these. That Scheuermann was expelled from the Union and fined five hundred dollars seven months before his discharge; that he made several tenders of dues at times preceding the execution of the union shop agreement here involved; that during the pertinent 30 day period, another employee (Ollis) who had been expelled from the Union at about the same time as

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[4] *Union Starch and Refining Co., vs N.L.R.B.*, 186 F 2d. 1008 (CA.7) certiorari denied, 342 U.S. 815; *Electric Auto Lite Co.*, 92 N.L.R.B. 1073, enforced 196 F. 2d. 500 (C.A.6); *The Eclipse Lumber Company*, 95 N.L.R.B. No. 59; *Pen and Pencil Workers Union, Local 19593, AFL*, 91 N.L.R.B. No. 155.

Scheuermann offered to pay dues, and was told by Smiley, the Union Steward, "you know I can't take dues from you guys"; that the Union did not request Ollis' discharge, nor did any of its agents, imply to him or to anyone else that such discharge would be requested; that under the union rules it could not legally accept dues from any person who was not a union member and whose tender of dues did not also include a tender of initiation or reinstatement fees; that Scheuermann *never* tendered dues or initiation fees either in fact or by implication during the crucial 30 day period provided for under the contract; that the contract was valid; that Scheuermann was discharged at the Union's request, and was told by the Employer at the time, that such request was based on his *failure to tender dues and fees;* that several days *after* his discharge, Scheuermann sought membership in the Union, and the Union then told him he could obtain such membership if he paid initiation fees, dues and the fine imposed on him seven months before.

Upon these facts, the inference that the motivation for discharge, was Scheuermann's failure to tender the *amount of the fine* during his period of employment rests wholly on what occurred after Scheuermann's employment was terminated. At such time—as Scheuermann was not an employee—the Union's demand for payment of the fine as a condition of *membership* was an act reflecting a matter purely between Scheuermann and the Union—unregulated by the Statute. [5]

[5] *Standard Brands, Incorporated,* (97 N.L.R.B. No. 102); wherein the Board said with regard to belated tenders of employees who had been discharged—"The fact that the Union refused to permit them to membership, while allowing automatically suspended members who were less seriously delinquent to do so, *did not render the discharge of complainants unlawful.*"

Finally, assuming *arguendo*, as the Board contends in its Brief (p. 16) that the "payment of the fine was the decisive consideration to the Union", such consideration was only for the condition of acquiring *membership* in the Union, but was not the decisive consideration for Scheuermann's retaining employment at the Employer's plant. That last consideration was the requirement of an offer of a tender of initiation fees. Having failed to make such a tender, Scheuermann was foreclosed from the protection afforded him by the Act. [6]

In conclusion, performance of the duty required by the contract permitted by the Statute; namely, "tender" is so simple and takes such an infinitesimal amount of effort and time, that it is most reasonable to require its performance as a condition of effective assertion of an 8(a) (3), 8(b) (2) charge. Although it may be conceded that the violation of the Act may be found even if tender is not made, such finding should be predicated on very clear and convincing evidence that the party charged with the violation *actually precluded* the making of the "tender in order to effect the discharge complained of." Such finding here is based upon no more than a mere scintilla of evidence arrived at by resort to "assumption upon assumption", and is bolstered by a statement of a legal principle very general in nature; namely, that the "law compels no man to do a useless act." [7]

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[6] Compare *Union Starch and Refining Co., vs NLRB, supra; Electric Auto Lite Co.,*[4] *supra,* distinguishable on their facts because in those cases a tender was actually made by the employee, who was then subsequently discharged.

[7] *Mayne's Case,* 5 Coke, 20 b.

CONCLUSION

It is respectfully submitted that the Board's findings and conclusions are not supported by substantial evidence, that its order is invalid and improper, and a decree should issue denying, *in toto*, the Board's petition for enforcement.

PLATO E. PAPPS,
COUNSEL
International Association of Machinists, Local No. 504

OCTOBER, 1952

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Supp. V. Sec. 151, *et seq*) are as follows:

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be an unfair labor practice for an employer—

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment, to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice), to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment, or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) *if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement.* [1]

[1] The italicized portion has been eliminated by amendment since these proceedings were instituted.

Provided further, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * * * *

SEC. 8 (b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7; *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

* * * * *

(2) To cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;